Supreme Court, U.S.
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No. 01-1885

IN THE

Supreme Court of the United States

MARY D. POLLARD,

Petitioner,

v.

HIGH'S OF BALTIMORE, INCORPORATED,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION

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PARTIES TO THE PROCEEDING AND STATEMENT PURSUANT TO RULE 29.6

The parties identified in the Petition for Writ of Certiorari are the only parties to this proceeding, *i.e.*, the Petitioner is Mary D. Pollard, an individual, and the Respondent is High's of Baltimore, Incorporated.

High's of Baltimore, Incorporated, is a privately owned company and all of the stock of High's of Baltimore, Incorporated, is owned by the Darnell family. High's of Baltimore, Incorporated, does not have any parent corporation and there is no other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of this litigation between High's of Baltimore, Inc. and Petitioner.

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STATEMENT OF THE CASE[1]

I.

Mary D. Pollard (hereinafter "Petitioner" or "Pollard") worked for Respondent (hereinafter "High's") since 1985. In 1997 Petitioner worked as an Area Supervisor responsible for about ten (10) stores, regularly working on average seventy (70) hours per week on a recurring basis, and "on-call" 24-hours per day, seven (7) days per week, for emergencies.[2] In August, 1997, Petitioner hurt her back on the job. She continued to work, however, until August 29, 1997, when her physician, Dr. Renzo Ricci, certified that she was incapacitated for the period from August 29, 1997, to September 7, 1997. Pollard returned to work on September 8, 1997, without any work restrictions and worked until December 11, 1997. At that time, Petitioner prepared for back-surgery which took place in January, 1998. Dr. Myles Brager performed the back surgery. (App. p. 2a) (L56, L62).

While Pollard recuperated from surgery, she filed a worker's compensation claim and employed an attorney to represent her in that claim — Barbara Porter, Esquire. Porter wrote to High's District Manager, Patricia Kelly, Petitioner's

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1. Respondent's "Lodging," (page numbers of which are cited herein as "L__"), contains documentation supporting facts recounted in this "statement of the case" as well as a copy of the February 6, 2001, Memorandum and Order of the District Court in *Pollard* denying Pollard's Motion to Amend or Alter Judgment.

2. High's submitted seven (7) affidavits in support of its Motion for Summary Judgment from High's personnel attesting to the rigors of the Area Supervisor position. Included in the Lodging to this Brief is Linda L. Lee's affidavit, which attests to the normal weekly hours worked by High's Area Supervisors.

immediate supervisor, and advised High's to direct all future inquiries concerning Pollard to Porter's attention and not to contact Pollard directly. Porter eventually was replaced by Wesley Blakeslee, Esquire, who corresponded with High's' workers' compensation carrier, Montgomery Mutual Insurance Companies ("MMIC")'s attorneys regarding Pollard's claim. As a consequence of Porter's letter, from Pollard's surgery in January, 1998, through late-August, 1998, High's did not contact Pollard directly nor did Pollard contact High's directly during this entire time period. (App. p. 3a) (L76, L51).

It was not until August 25, 1998, that Pollard herself called District Manager Patricia Kelly directly and told Kelly she was anxious to return to her job. MMIC had retained a rehabilitation consultant, Alberto Felix, who worked to coordinate Pollard's return to work with High's Operations Manager, Timothy D. Sheehan — who responded positively to the idea of Pollard's returning, noting Pollard had been a dedicated worker and good employee. (App. pp. 3a, 19a) (L62, L152).

On September 4, 1998, Felix met with both Dr. Myles Brager, Pollard's physician, and Pollard to discuss her ability to return to work. After this meeting, Felix received a copy of Dr. Brager's notes regarding Petitioner, which stated:

> Patient is doing quite well with normal activities of daily living. She is spending more time in and out of a car. Overall I think there is no question that she is now ready to go back to work at 8 hours per day, and I think we can even increase her lifting limit to 25 pounds. I still do not want her to do repetitive bending. We will do this for

> several weeks. I will see her in one month and re-evaluate her at that time for further return to normal duties at work.

(App. p. 8a) (L69).

On September 18, 1998, Felix, Timothy Sheehan, the Operations Manager for High's, and Pollard met at High's to discuss Pollard's return to work, including her recovery accommodation needs and what High's could do to accommodate her. It was determined, as a result of that meeting, that Petitioner was unable to perform the job requirements of the Area Supervisor position but that she could perform in a light-duty, modified store clerk position, wholly accommodating of her lifting and bending restrictions, in the interim while she worked to regain her capacity to perform the Area Supervisor position. There was not at this meeting, or anytime afterwards, any suggestion by High's that Pollard would not or might not ultimately return to her job as an Area Store Supervisor. (App. p. 7a) (L15, L62).

Petitioner began working on September 23, 1998, but transitioned slowly. As it turned out, despite her doctor's September 4, 1998, evaluation, she was never to actually work even a single full eight (8) hour day. She worked in the position for six (6) weeks thereafter and never worked more than four (4) to five (5) or six (6) hours a day. On September 29, 1998, Petitioner obtained a follow-up examination from Dr. Brager, who noted that Pollard's "physical examination today reveals normal gait with good mobility throughout" and that:

> I feel at this time Mary is ready to return to her regular work, unlimited hours, with the only

> restriction being that she not lift more than 25 pounds or that she not bend on a repetitive basis.

(App. p. 9a) (L15, L70).

Petitioner informed Sheehan that Dr. Brager had released her to work unlimited hours and therefore she should be able to return to her Area Supervisor position. However, Sheehan determined Petitioner's work performance to date had not yet demonstrated the physical capacity for unlimited work hours because she had not been able to work even a full eight (8) hour shift once, let alone the seventy (70) hours per week the typical High's area supervisor worked. Accordingly, Sheehan advised Pollard she would have to remain in the modified store clerk position until fully ready to return to her normal position. (App. p. 11a) (L15).

Throughout October, 1998, Pollard never asked High's for any additional accommodation(s) in the store-clerk position beyond the full accommodation of her lifting and bending restrictions and flexibility in shift hours. Pollard made no other complaint to High's about her working conditions other than her expressed desire to return soon to her Area Supervisor's position. But again, not working even a full day on a single occasion, among her other restrictions, required Petitioner's remaining in the interim store-clerk position until she progressed, as expected, to a capacity to assume the Area Supervisor position. (App. pp. 9a-11a) (L48).

Pollard herself repeatedly admitted in her deposition that the sales-clerk assignment was understood by all as a temporary assignment. She admitted that although she had not, by the time she resigned, proved an ability to work an

eight (8) hour day, let alone the seventy (70) hour week normally worked by High's Area Supervisors, no one at High's indicated they thought she was permanently, physically foreclosed from that position. She admitted she was unable to work a full eight (8) hour day, despite her working only primarily in running the cash register and making deli sandwiches. Based on this, Sheehan regarded her as not yet then able to resume the Area Supervisor's position — though not permanently disqualified. (L20, L21).

Unbeknownst to High's management, Petitioner was feeling humiliated and frustrated in her interim position and sought new employment elsewhere. After just six (6) weeks working part-time in the modified store-clerk position, Petitioner accepted an offer of employment with a car dealership and left her employment with High's on or about October 29, 1998, without giving prior notice to High's. (App. p. 11a) (L53-L55).

Two (2) years later, in July, 2000, in response to High's Motion for Summary Judgment, Petitioner obtained an affidavit from Dr. Myles Brager in which he stated in July, 2000, that he had believed Petitioner had been permanently disabled since early 1998, as she was significantly and permanently "restricted as to the condition, manner and duration under which she can perform each of the activities of standing, sitting, lifting, bending, stooping, squatting, kneeling and remaining in one position." (App. p. 10a) (L77).

Dr. Brager's affidavit offered no explanation as to why in 1998 he had not informed Petitioner or High's of that opinion, that Petitioner was permanently disabled, or otherwise reconcile his 1998 opinions that Petitioner was expected to improve to full working capacity. (App. p. 10a)

(L77). A fair reading of Dr. Brager's notes in 1998 — at the critical junctures — made plain that his July, 2000, affidavit prepared by Petitioner's counsel, cannot as the trial judge and appellate panel both found, be reconciled.

Additionally, during the summer of 2000, Petitioner obtained two (2) vocational expert reports prepared on the basis of Dr. Brager's revised 2000 medical opinion of Petitioner's condition. Those two (2) reports by Kathleen Sampeck and Lianne Friedman had not been made known to High's except upon summary judgment proceedings in the summer of 2000, well after the late summer and early fall of 1998, the critical time period here. (App. p. 10a).

As of the Fall of 1998, High's had absolutely no knowledge of medical or vocational rehabilitation opinions to the effect that Petitioner was, before she resigned her employment with High's in the Fall of 1998, permanently disabled and foreclosed from a broad class of jobs as later asserted by Brager, Friedman and Sampeck. (App. p. 9a).[3]

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3. In fact, while Petitioner's Brief, p. 3, begins with paragraphs about the physician and physical therapist "opining", to whom did they so opine and when? Dr. Brager's notes in September, 1998, were that Pollard could work as an area supervisor with only the 25-pound lifting limitation — and no hours restriction. Mr. Brager, the vocational rehabilitation therapist, admitted at his deposition that he never shared his opinion and views of Pollard with High's, although he knew that High's would have been the most natural recipient for him to express them. (L27-L41).

REASONS FOR DENYING THE WRIT

I.

THE PETITION MUST BE DENIED BECAUSE THE PETITION MISSTATES FACTS IN THE RECORD BELOW AND BEGS AN EVIDENTIARY QUESTION RULED UPON BY THE DISTRICT COURT BELOW AND NOT PROPERLY PRESENTED IN THE PETITION

There is no reason for this Court to exercise its discretion to review Petitioner's appeal under Sup. Ct. R. 10 where the Petition fails to disclose the complete record below and impliedly asserts a misstatement about the nature of the medical testimony addressing the issue of "substantial limitation."

The appendix to the Petition includes a copy of the Decision and Order of the Fourth U.S. Circuit Court of Appeals in this case, No. 01-1342 (February 25, 2002). The appendix also includes the November 21, 2000, Memorandum and Order granting summary judgment to Respondent High's by U.S. District Judge Andre M. Davis of the United States District Court for the District of Maryland. However, the Appendix inexplicably fails to include Judge Davis' February 5, 2001, Memorandum and Order denying Pollard's December 7, 2000 Motion to Amend or Alter Judgment. (A copy of Judge Davis' February 5, 2001, Memorandum and Order is included in the "Lodging" submitted with this brief. Petitioner's Appendix also omits the Fourth Circuit's denial of Pollard's petition for rehearing *en banc*.

Pollard's Motion to Amend or Alter Judgment claimed Judge Davis improperly refused to consider post-litigation affidavit statements made by Dr. Myles Brager in July, 2000, retrospectively opining Pollard was substantially limited by her back injury impairment as of January, 1998. Dr. Brager's 2000 retrospective medical opinion directly contradicted his own medical opinion in 1998 as set forth in his several notes in Pollard's medical records.

Dr. Brager's 1998 notes, contemporaneous with the circumstances underlying this case, demonstrated his opinion in 1998 that the impairments Pollard sustained as a result of her back injury and surgery were improving and expected to improve so that she could resume full employment as an Area Supervisor. For example, Dr. Brager's August 18, 1998, note provided that "there is a good chance that after an initial 'break in' that [Pollard] will be able to get back to the kind of work that she had done in the past". Additionally, Dr. Brager's September 4, 1998, note provided that "Patient is doing quite well with normal activities of daily living . . . [and Dr. Brager would see Pollard in one month to] "re-evaluate her at that time for further return to normal duties at work". Furthermore, Dr. Brager's September 29, 1998, evaluation contained his opinion that Pollard was ready to "return to her regular work, unlimited hours . . .". (L69, L70) (App. pp. 7a-10a).

Both High's and Pollard had knowledge of Dr. Brager's 1998 medical opinion during the Fall of 1998 and both approached Pollard's returning to employment with High's in the Fall of 1998 based, in part, on Dr. Brager's 1998 medical opinion. (High's and Pollard also based their approach to her return based on Pollard's own assertions of her ability to work and in the demonstration of her own pace

of physical progress at work). The medical information available to both High's and to Pollard in 1998 comprised medical opinion that Pollard's impairment was of a temporary nature expected to improve to the degree that she could return to her normal full-time employment status as an Area Supervisor. Pollard was placed in a temporarily modified light-duty store-clerk position, based on this information, with full accommodation of her temporary lifting and bending restrictions, her inability to work a full day and without limitation as to her own pace for increasing her strength and endurance.

The Petition relies upon masking this important detail where on page 3, paragraph 2, it states: "[a]n orthopedic physician has opined that, on a permanent basis, Petitioner's back injury significantly restricts her . . .". Without any knowledge of the complete record below and the entirety of medical evidence considered by High's, one would fail to ask the most pertinent of questions with regard to this Petition statement — *i.e.*, "opined to whom at High's and when?" High's contends that as the answer to "when" and "to whom at High's" an orthopedic physician opined the permanency of Pollard's limitations is "July 2000" (two years after Petitioner's resignation from employment) and "no one at High's" (in July 2000 or the Fall of 1998), then the Petitioner's reliance on this evidence as a basis for appeal to this Court is simply without merit.

According to Petitioner, Dr. Brager's July, 2000, affidavit, although directly contradicting his own 1998 medical opinion, and albeit prepared post-litigation, justifies certiorari review to decide the question whether ". . . the ADA's definition of disability covers a back impairment that, according to expert medical testimony, significantly restricts

an individual, as compared to the average person . . .". However, this simply misrepresents the nature of the basis for the Fourth Circuit's decision to affirm the District Court. For any rational court could hardly gainsay that properly founded, fact specific and relevant expert medical testimony of an individual's back impairment significantly restricting major life activities supports finding a "disability". What Petitioner contends, is that *retrospective* medical testimony by the same physician who provided directly contradictory opinion two (2) years previously, which *retrospective* opinion was unavailable to anyone at the Petitioner's employer at the time for determining her status, should be relied upon to impose liability on an employer, retrospectively, for violating the ADA.

In Judge Davis' February 6, 2001, Memorandum and Order denying Pollard's Motion to Amend or Alter Judgment, he stated:

> Contrary to Pollard's argument . . . [that the Court wrongly disregarded the July 2000, affidavits of Dr. Brager] . . . I did not 'disregard[ ]' Dr. Brager's post-litigation statement set forth in his affidavit. Indeed, for the purpose of High's summary judgment Motion, I assume to be true Dr. Brager's statement of July 14, 2000, that he believed Pollard to be 'permanently disabled and had been since at least January, 1998'. Nevertheless, Dr. Brager's post-litigation opinion was irrelevant to the critical issues before me on summary judgment namely: (1) whether, *prior to Pollard's voluntary resignation from her employment with High's*, Pollard had attained the status of a 'qualified individual with a disability' under the

> ADA and, (2) the further issue (one that was inextricably bound up with the first) of whether High's was on notice that Pollard was 'disabled' rather than simply temporarily physically impaired, within the meaning of the ADA *during the six week period between Pollard's return to work from back surgery and her voluntary resignation.*
>
> I concluded on the record before me that despite her extended, months-long, absence from work (in consequence of her back surgery and related recuperation), that upon her return to the workplace, during which she was assigned to a position other than her regular job and for the six weeks prior to her resignation, Pollard did not attain the status of a 'qualified individual with a disability' in respect to her job of Area Supervisor for High's and that, therefore, as a matter of law, she was not, during those six weeks, entitled to the protections afforded by the ADA. I further concluded that, as a matter of law, there was no genuine dispute of material fact as to whether High's knew, or could have known, during a relevant period of time, that Pollard's impairment was of such a nature as to impose upon High's the duties required of an employer covered by the ADA.

(L2-L3) (Emphasis in original).

This Court has already stated, in *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 481-489 (1999) that in order for ADA protection (or liability) to attach, the ADA

". . . requir[es] that a person be presently — not potentially or hypothetically — substantially limited in order to demonstrate a disability". Consistent with this, the Fourth Circuit properly considered all of the medical opinion available *in 1998*, including Dr. Brager's and another physician's — Dr. Rosenthal's, all of which indicated Pollard's condition could not be viewed, *in 1998*, as a permanently impaired condition. With respect to Dr. Brager's July, 2000, change of opinion, the Fourth Circuit stated in footnote 3:

> . . . Contrary to Pollard's assertion, Dr. Brager's revised opinion and the opinions of her hired vocational experts, based on that 2000 report, do not affect our analysis under the ADA because 'the date of an adverse employment decision is the relevant date for determining whether a plaintiff is a qualified individual with a disability . . . And as the district court noted, there does not appear to be any "authority in the case law interpreting the ADA to allow a medical practitioner's *nunc pro tunc* opinion to contradict his own contemporaneous opinion concerning a patient's disability in order to shore up a discrimination claim.

(App.10a).

Thus, Petitioner misstates that at the time of the events underlying this case, there was no information available to either High's, or to Pollard, *or to the physicians treating Pollard and reviewing her case*, that she was substantially limited or permanently limited in her major life activities. The July, 2000, retrospective opinion of Dr. Myles Brager

(and the vocational expert reports premised upon that July, 2000, retrospective opinion) did not constitute evidence that in the Fall of 1998, at the time she resigned her employment from High's, Pollard was disabled. In 1998, Dr. Brager did not tell anyone or note that he thought Pollard was disabled — and if he did think so back then, he offered no explanation in his July, 2000, affidavit to reconcile his 1998 written contrary statements. Thus, the July, 2000, affidavit of Dr. Brager was not relevant to determine Pollard's then 1998 condition. It failed in foundation and specificity precisely because of the existence of his irreconcilable 1998 opinions.

Because Petitioner has not properly represented the relevant record below and begs an evidentiary issue not properly presented, the Petition must be denied.

II.

THE PETITION ASKS THIS COURT, AS A CONDITION TO DETERMINING THE QUESTIONS PRESENTED, TO FIND WORKING AS A MAJOR LIFE ACTIVITY WHERE THIS COURT HAS NOT HERETOFORE RULED AND THE PARTIES BELOW DID NOT BRIEF OR ARGUE THE ISSUE. AS SUCH, THE PETITION REQUIRES REVIEW OF AN ISSUE NOT PROPERLY PRESENTED OR RIPE FOR DETERMINATION AND IT MUST BE DENIED.

The "Questions Presented" in the Petition ask the Court to define ". . . the standards for determining whether the ADA's definition of disability covers a back impairment that . . . according to expert vocational testimony, forecloses that individual from more than seventy percent (70%) of jobs in the relevant labor markets" and ". . . the standards for

determining whether an employer regards an individual with an impairment as disabled in one or more major life activities, including working." Both of these questions ask the Court to decide in the first instance that "working" is a major life activity, when this Court has not done so before. *See Toyota Motor Manufacturing, Kentucky, Inc., v. Williams*, 534 U.S. 184 (2002). ("Because of the conceptual difficulties inherent in the argument that working could be a major life activity, we have been hesitant to hold as much as we need not decide this difficult question today"). *See also Sutton v. United Airlines, Inc.*, 527 U.S. 471 (1999) (The Court assumed without deciding that working is a major life activity).

In *Toyota* and *Sutton*, the issues regarding "substantial limitation" did not arise from questions seeking an ultimate determination of an *actual* disability arising from a substantial limitation to working.[4] Contrariwise, the Petition here asks this Court to determine evidentiary standards for establishing an *actual* disability based upon a claimed substantial limitation to working. However, because neither party has put into dispute whether working is a major life activity, and this Court has not heretofore made that determination, the evidentiary questions Pollard presents in her Petition are not ripe for this Court's review. They beg the conditional determination that working is a major life activity.

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4. The issue in *Sutton* had to do with whether or not the employer "regarded" the plaintiffs as disabled by "regarding" them as substantially limited in their capacity to work.

III.

THE PETITION MUST BE DENIED BECAUSE IT FAILS TO IDENTIFY A CONFLICT AMONG THE COURTS OF APPEALS ON A QUESTION OF LAW UNDER THE ADA, OR, THE QUESTIONS PRESENTED ARE TOO FACT SPECIFIC AND INCAPABLE OF PRECEDENTIAL EFFECT.

A. There is no conflict between the Fourth Circuit and other Courts of Appeals, or with this Court, about the application of an individualized inquiry into the issue of "substantial limitation" of a major life activity.

Petitioner has identified no conflict with this Court or with the courts of appeals with regard to the legal framework or standard for determining the existence of a substantial limitation to major life activities, including working. Petitioner claims the Fourth Circuit deviated from this Court's rulings in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184, 151 L. Ed. 2d 615 (2002) and *Sutton v. United Air Lines, Inc.*, 527 U.S. 417 (1999) and conflicted with four other Courts of Appeals[5] by failing to conduct an individualized inquiry in *Pollard*. According to Petitioner, this is demonstrated by the Fourth Circuit's improper reliance on "doctors' notes" — a reliance alleged to be at odds with the Third Circuit. Additionally, Petitioner asserts, the Fourth Circuit, at odds with *Sutton*, *Toyota*, and the Sixth Circuit, failed to consider Petitioner's education, skills, and training. Furthermore, the Fourth Circuit, at odds with the Sixth Circuit, improperly relied on evidence of Pollard's having taken a job at a car dealership. Finally, the

5. The Seventh, Sixth, Eighth and Third.

Fourth Circuit's ultimate failure, according to Petitioner, was finding no evidence (or evidence raising a genuine issue of fact) that Petitioner's physical restrictions were substantially limiting of any major life activities when there are cases out there that have found otherwise in seemingly similar circumstances.

What Petitioner is really arguing against, however, is that the Fourth Circuit's application of the individualized inquiry in this case resulted in a determination that Pollard failed to produce the requisite measure of evidence of a disability. Although Petitioner produced some evidence addressing the issue of her limitations, it was not sufficient to raise a genuine issue for trial *about her own experience of a significant restriction in her major life activities in the Fall of 1998* – when she resigned her employment from High's. (*See Celotex Corp. v. Catrett*, 477 U.S. 317 (1986)). (*See also Toyota, supra*, and *Sutton, supra*, (in order to establish an actual disability, not only must there be evidence of a physical or mental impairment, there must also be evidence of substantial limitation in a major life activity relative to the plaintiff's own experience).

In this case, the relevant[6] evidence adduced on the issue of whether Petitioner was disabled within the meaning of

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6. The Fourth Circuit agreed with the District Court that Dr. Brager's July, 2000, affidavit was not relevant to the issue of Pollard's disability, and neither were the vocational expert reports based on Dr. Brager's July, 2000, *"nunc pro tunc"* observations. (App. p. 10a). The point of contention on this evidence is addressed in Respondent's first argument in this Brief. It is interesting that Dr. Brager's note of September 4, 1998, almost foreshadows this Court's discussion of major life activities in *Toyota*, when Brager observes that Pollard ". . . is doing quite well with normal activities of daily living." (App. 8a) (L69).

the ADA in the Fall of 1998 included medical records, physician and rehabilitation counselor opinions, Petitioner's own assertions and her demonstrated work performance, including her resignation to accept new full-time employment elsewhere. None of this evidence demonstrated that Petitioner's physical restrictions could be viewed as permanent in 1998, not even by her attending physician. *See Toyota*, 151 L. Ed. 2d at 631 (An impairment must be permanent or long-term to be substantially limiting). Brager's 1998 notes make clear that Pollard is, in his contemporaneous opinion, on the road to full recovery and only needs a little transition for a temporary period. Additionally, none of this evidence addressed how Petitioner's restrictions substantially limited her in her daily life activities, anyway, as contemplated by this Court in *Toyota*. There was no evidence that routinely lifting 25 or more pounds or engaging in repetitive bending or stooping was of central importance to Petitioner's daily life. *See Toyota*, *supra*, 151 L. Ed. 2d 615, 630 (An impairment is not substantial if only interfering in a minor way — plaintiff needs to produce evidence of significant restrictions). Relative to working as a major life activity — Petitioner's evidence, again, was not sufficient to raise a genuine issue of material fact for trial. A *temporary* restriction to performing several discrete job duties does not rise to the level of a disability under the ADA. Petitioner's evidence fell below that measure of evidence necessary to demonstrate a substantial limitation to the major life activity of working, even assuming that this Court were to find that working is a major life activity. She produced no relevant evidence to rebut the substantial evidence of the temporary nature of her limitations as understood by High's in the Fall of 1998. She also produced no relevant evidence that she was foreclosed from a broad class of jobs in the Fall of 1998 — let alone her own pre-injury job with High's — before

she resigned her position from High's. There must be evidence the impairment substantially limits employment generally rather than in just one job or in a narrow range of jobs. *See Contreras v. Suncast Corp.*, 237 F.3d 756, 763 (7th Cir. 2001) (Plaintiff's "inability to lift 45 pounds for a long period of time . . . and inability to drive a forklift for more than four hours a day . . . do not constitute a significant restriction on one's capacity to work"). *See also McKay v. Toyota Motor Mfg. USA, Inc.*, 110 F.3d 369, 373 (6th Cir. 1997) (Plaintiff was not disabled because she was unable to do repetitive motion factory work, where this inability did not foreclose her from a broad class of jobs). *See also Williams v. Channel Master Satellite Systems, Inc.*, 101 F.3d 346, 349 (4th Cir. 1996) (A twenty-five (25) pound lifting restriction cannot constitute a significant restriction to the major life activity of working as compared to the average person's lifting capacities). *See also Webner v. Titan Distribution, Inc.*, 267 F.3d 828, 834 (8th Cir. 2001) (A lifting restriction standing alone is insufficient to demonstrate a substantial limitation to working).

None of the circuit court cases cited in Petitioner's Brief conflict with the Fourth Circuit's decision in *Pollard*. None of the cases demonstrate that the evidence in this case, first and foremost indicating a temporary impairment, was sufficient to raise a genuine issue of fact of substantial limitation to major life activities of lifting, bending, stooping, or working. The cases cited by Petitioner demonstrate that the questions presented on this Petition are fact-specific and thus incapable of precedential effect.

Cochrum v. Old Ben Coal Company, 102 F.3d 908 (7th Cir. 1996), *Burns v. Coca-Cola Enterprises, Inc.*, 222 F.3d 247 (6th Cir. 2000), *Webner v. Titan Distribution, Inc.*,

267 F.3d 828 (8th Cir. 2001), and *Mondzelewski v. Pathmark Stores, Inc.*, 162 F.3d 778 (3d Cir. 1998) each fail to demonstrate a conflict with the Fourth Circuit's decision in *Pollard v. High's of Baltimore, Inc.*, 281 F.3d 462 (4th Cir. 2002). In each of these cases, unlike in *Pollard*, there was no evidence of a present inability to view the plaintiffs' impairments as permanent, whereas all of the information available here in 1998 was that Petitioner's impairments were temporary. Additionally, the physician or vocational expert opinion supporting the finding of disability in the cases cited by Petitioner implicated no issue about relevance, lack of foundation or specificity. In *Pollard*, on the other hand, the retrospective opinion of Dr. Brager and the vocational expert reports based on that opinion were found not relevant. (App. 10a). In any event, High's could not have known about them, and did not, in the relevant time period, in the Fall of 1998.

Significantly, moreover, the cases cited by Petitioner were decided before this Court's decision in *Toyota*, as well as more recent case law from the same Circuits, following *Toyota*, which call into doubt those earlier cases Petitioner cites or distinguish their findings from *Pollard*. For example, the finding of no disability by the Seventh Circuit in *Stein v. Ashcroft*, 284 F.3d 721 (7th Cir. 2002) and *Contreras v. Suncast Corp.*, 237 F.3d 756 (7th Cir.), *cert. denied*, 122 S. Ct. 62 (2001) is reconciled with the finding of disability by the Seventh Circuit in *Cochrum v. Old Ben Coal Co.*, 102 F.3d 908 (7th Cir. 1996), based on the breadth of the plaintiff's limitations. The limitations in *Cochrum v. Old Ben Coal Company*, 102 F.3d 908 (7th Cir. 1996) comprised "no" overhead work, heavy lifting, or pulling or pushing out from the body and supported finding a disability. This contrasted with the limitations in *Contreras v. Suncast*, 237 F.3d 756

(7th Cir.), *cert. denied*, 122 S. Ct. 62 (2001), which comprised a forty-five (45) pound lifting restriction and a prohibition against strenuous work which the Seventh Circuit found could not "constitute a significant restriction on one's capacity to work." *Id.* at 763. *Pollard*, similar to *Contreras*, presents a case of limited lifting and bending restrictions and is distinguishable from *Cochrum*.

In *Burns v. Coca-Cola Enterprises, Inc.*, 222 F.3d 247 (6th Cir. 2000), the Sixth Circuit emphasized the district court's finding of disability was not at odds with other cases involving seemingly similar impairments and applications, because the application of the individualized inquiry in *Burns* demanded a different result. Even if the *Burns* decision showed some conflict between the Sixth and Fourth Circuits — it was a short-lived conflict, where, as of June 28, 2002, the Sixth Circuit commented in *Mahon v. Crowell* No. 00-6134, __ F.3d __ (6th Cir. 2002) (L8) that *Burns* was decided before *Toyota* and on a less than demanding standard for determining whether a plaintiff was substantially limited in the major life activity of working.

In *Mahon* the court found the plaintiff, a steamfitter, was not disabled by his herniated disc and resulting restrictions on bending, lifting and climbing because those restrictions alone could not constitute a substantial limitation to working. The vocational expert's analysis produced by the plaintiff opined the plaintiff was foreclosed from steamfitter-classed jobs based on his assertion that he could not perform steamfitter job duties. However, the evidence demonstrated contrariwise — that right after plaintiff's injury, he was employed as a steamfitter, albeit with restrictions. Moreover, the plaintiff asserted his continued qualification as a steamfitter. (L8, L12).

In *Webner v. Titan Distribution, Inc.*, 267 F.3d 828 (8th Cir. 2001), the court acknowledged that a lifting restriction standing alone was insufficient to demonstrate a substantial limitation to working[7]. *Id.*, 267 F.3d at 834. In *Mondzelewski v. Pathmark Stores, Inc.*, 162 F.3d 778 (3d Cir. 1998), the court likewise acknowledged that evidence of an impairment alone was not enough to show substantial limitation to working. *Id.*, 162 F.3d at 784. *Webner* and *Mondzelewski* simply do not conflict with the Fourth Circuit's decision in *Pollard*. Pollard's restrictions prohibiting her from lifting 25 pounds and engaging in repetitive bending and stooping did not prove she was foreclosed from a broad class of jobs when she produced no relevant evidence of that foreclosure — or even that she was foreclosed from her own job with High's.

Thus, there is no demonstrable conflict between the cases cited by Pollard and the Fourth Circuit's decision in *Pollard*, because they are all factually distinguishable — precluding a pro forma result from the application of an individualized inquiry.

Additionally, Petitioner's claim that the Fourth Circuit improperly failed to consider Petitioner's education, skills, and training does not raise an issue for review because there is no conflict between the Fourth Circuit and any other Circuit identified by Petitioner on this matter. The relevant evidence in this case indicated that in 1998 Petitioner's limitations were viewed as temporary by her doctor, her employer and by Pollard herself. Moreover, the evidence indicated that

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7. The Plaintiff's vocational expert analysis and report in *Webner* which supported finding substantial limitation to working was not questionable relative to relevance as were the vocational expert reports, based on retrospective medical opinion, in *Pollard*.

Petitioner was not even foreclosed from her job with High's. Given this, the further vocational-type inquiry normally associated with plaintiffs foreclosed from their normal employment and facing long-term employment impact was not even relevant in *Pollard* and it was not improper for the Fourth Circuit not to pursue it. *See Burns v. Coca-Cola Enterprises*, 222 F.3d 247 (6th Cir. 2000). *See also Deppe v. United Airlines*, 217 F.3d 1262 (9th Cir. 2000) (relevant medical opinion asserted plaintiff lost one-half of his pre-injury capacity for lifting, and bending and this was "permanent and stationary" and plaintiff "most likely would be unable to return to his position as a line mechanic"). In any event, unlike in the cases cited by Petitioner, the Fourth Circuit had no relevant, timely, vocational expert evidence to consider, in the first instance.

Likewise, the Fourth Circuit's decision does not conflict with the general admonishment that a plaintiff may nonetheless be foreclosed from a broad class of jobs even if obtaining employment in one job. *See Webb v. Garelick Mfg. Co.*, 94 F.3d 484 (8th Cir. 1996), *See also DePaoli v. Abbott Labs.*, 140 F.3d 668 (7th Cir. 1998)[8]. In this case, however, the crux of the matter is, again, that Petitioner produced no relevant evidence that in 1998 she had a permanent impairment and was foreclosed from a broad class of jobs. Given this, the Fourth Circuit properly viewed her resignation from High's to accept new employment elsewhere as

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8. Petitioner's reference to *Henderson v. Ardco, Inc.*, 247 F.3d 645 (6th Cir. 2001) simply does not support Petitioner's argument, where the employer in that case asserted it could not have regarded the plaintiff as disabled because she was able to work at another job. Here, High's asserted it did *not* regard Petitioner as disabled because it thought her work limitations were temporary — not simply because she obtained employment elsewhere.

"*reinforc*[*ing*] [the court's] *conclusion* [based on all the evidence] that Pollard was not substantially limited in the major life activity of working". (App. p. 11a) (emphasis added)[9].

Finally, Petitioner's assertion that the Fourth Circuit's reliance upon the numerous and fact-specific doctor's notations in this case conflicted with the Third Circuit and justified review borders on the frivolous. The Third Circuit, in *Taylor v. Phoenixville Sch. Dist.*, 184 F.3d 296 (3d Cir. 1999), rejected any determination of a lack of disability based on a doctor's singular note that was *a conclusory one-liner* that the plaintiff there was "able to return to work and is not disabled". The Third Circuit noted that the particular doctor's note in question "could hardly [be] conclusive proof that [the plaintiff] was not substantially limited". *Id.*, 184 F.3d at 310-311. Petitioner did not even attempt to reconcile the difference in the nature and scope of the doctor's conclusory note in *Taylor* with the fact-specific explanatory *series* of doctor's notations in *Pollard* — even while arguing this "conflict" in the treatment of doctor's notes between the Third and the Fourth Circuits justifies certiorari review. For this lack alone, the Petition must denied.

B. The Fourth and Sixth Circuits do not conflict on the standards for determining whether an individual is "regarded" as disabled.

Contrary to Petitioner's assertions otherwise, there was no evidence before the Fourth Circuit that High's regarded Pollard as disabled within the meaning of the ADA, and the

9. We note that nowhere in the Petition does Pollard protest the Fourth Circuit's affirmance that Petitioner was not constructively discharged from her employment and that she voluntarily resigned it. (App. pp. 12a-14a).

Fourth Circuit's decision does not conflict with the Sixth Circuit. The physician and vocational expert opinions of the summer of 2000 were never given to High's at any relevant time — only months after litigation had been initiated at the federal district court level and then, only after discovery had ended and High's had filed a dispositive motion. The only medical and rehabilitation opinions available to High's, at any material time, were those in 1998 stating clearly that Dr. Brager thought Petitioner was expected not only to improve (but could not immediately perform her Area Supervisor's position) but was "ready" to do her old job. Just because High's accommodated Petitioner's temporary needs as it perceived them does not mean High's regarded Petitioner as disabled. There is nothing in *Henderson v. Ardco, Inc.*, 247 F.3d 645 (6th Cir. 2001) that would compel a different finding. In *Henderson*, again, unlike in *Pollard*, there was no substantial evidence the employer there perceived the plaintiff's limitations as temporary.

CONCLUSION

For all the above reasons, we submit that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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Baltimore, Maryland 21202
(410) 332-1343

Dated at Baltimore, Maryland
this 26th of July, 2002.

APPENDIX

APPENDIX A — MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND DATED AND FILED FEBRUARY 6, 2001

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

CIVIL NO. AMD 99-3455

MARY D. POLLARD,

Plaintiff

v.

HIGH'S OF BALTIMORE, INC.,

Defendant

MEMORANDUM

On November 21, 2000, I granted summary judgment to defendant High's of Baltimore, Inc., in this vigorously contested discrimination case instituted by a former employee of High's pursuant to the Americans With Disabilities Act ("ADA"). Plaintiff has filed a timely motion to alter or amend judgment, to which High's has filed an opposition. The issues have been fully briefed and no hearing is necessary.

Although Federal Rule of Civil Procedure 59(e) does not itself provide a standard under which a district court may grant a motion to alter or amend a judgment, the Fourth Circuit has "recognized that there are three grounds for

amending an earlier judgment: (1) to accommodate an intervening change in controlling law; (2) to account for new evidence not available at [the time of decision]; or (3) to correct a clear error of law or prevent manifest injustice." *Pacific Ins. Co. v. American Nat'l Fire Ins. Co.*, 148 F.3d 396, 403 (4th Cir. 1998), *cert. denied*, 525 U.S. 1104 (1999); *Hutchinson v. Staton*, 994 F.2d 1076, 1081 (4th Cir. 1993). Pollard relies exclusively upon her contention that my earlier memorandum contains clear errors of law that must be corrected to prevent manifest injustice. I am not persuaded that I committed clear errors of law or that injustice results from the entry of judgment in favor of defendant, but several of Pollard's contentions bear mention.

Pollard argues that I "wrongly disregarded the affidavit statements of Dr. Brager," her treating physician, when I concluded that those statements provided no basis upon which a jury could find that Pollard qualified as disabled under the ADA during the time that she was employed by High's. Pollard cites Fourth Circuit case law for the proposition that a district court cannot disregard a witness affidavit on summary judgment on the basis that the affidavit contradicts the witness' prior statements. *Vathekan v. Prince George's County*, 154 F.3d (4th Cir. 1998); *Shockley v. City of Newport News*, 997 F.2d 18 (4th Cir. 1993)

Contrary to Pollard's argument, however, I did not "disregard[]" Dr. Brager's post-litigation statements set forth in his affidavit. Indeed, for the purposes of High's summary judgment motion, I assumed to be true Dr. Brager's statement of July 14, 2000, that he believed Pollard to be "permanently disabled and had been since at least January 1998."

Nevertheless, Dr. Brager's post-litigation opinion was irrelevant to the critical issues before me on summary judgment, namely; (1) whether, *prior to Pollard's voluntary resignation from her employment with High's*, Pollard had attained the status of a "qualified individual with disability" under the ADA and, (2) the further issue (one that was inextricably bound up with the first) of whether High's was on notice that Pollard was "disabled," rather than simply temporarily physically impaired, within the meaning of the ADA, *during the six week period between Pollard's return to work from back surgery and her voluntary resignation.*

I concluded on the record before me that despite her extended, months-long, absence from work (in consequence of her back surgery and related recuperation), that upon her return to the workplace (during which she was assigned to a position other than her regular job) and for the six weeks prior to her resignation, Pollard did not attain the status of a "qualified individual with a disability" in respect to her job of Area Supervisor for High's and that, therefore, as a matter of law, she was not, during those six weeks, entitled to the protections afforded by the ADA. I further concluded that, as a matter of law, there was no genuine dispute of material fact as to whether High's knew, or could have known, during the relevant period of time, that Pollard's impairment was of such a nature as to impose upon High's the duties required of it as an employer covered by the ADA.[1]

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1. Pollard's heavy reliance on case law from outside the Fourth Circuit, particularly federal and state cases arising in the Ninth Circuit, is duly noted. It may be that the Fourth Circuit will embrace a similarly expansive interpretation of what transient physical

(Cont'd)

I based this reasoning, in part, upon testimony about what Pollard herself repeatedly communicated to High's about her readiness and ability to return to full-time active duty as an Area Supervisor. I also based this reasoning on the contemporaneous notes of Dr. Rosenthal, the workers' compensation carrier physician who oversaw Pollard's "work hardening" program, documenting that Pollard continued to improve and would soon improve to the degree that she could return to full-time work without restrictions. Finally, and most importantly, this reasoning was also supported by Dr. Brager's *contemporaneous treatment notes and his orders based thereon*, which explained that Pollard *was likely* to make a full recovery and *was expected* to make a full recovery, documented her improvement over several months, and progressively removed restrictions to allow her unlimited hours of work.[2] Never once during Pollard's six week resumption of job duties (prior to her resignation) did Dr. Brager, Pollard's (then) attorney or Pollard herself inform High's that she was (or might be) anything other than temporarily impaired. *Indeed, there was no medical evidence upon which to form such a conclusion at that time.* Thus, as I reasoned in my opinion, as a matter of law, Pollard was not a "qualified individual with a disability" in respect to her

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(Cont'd)

limitations (thought by the employee and her treating physician, as well as the employer, to be strictly temporary impairments nearing complete resolution), entitle the employee to ADA protection and impose reciprocal statutory duties upon an employer. But the Court has not yet done so.

2. Dr. Brager maintained the prohibition against lifting anything heavier than 25 pounds and against repetitive bending.

job as an Area Supervisor, and no reasonable jury could conclude by a preponderance of the evidence that High's violated the ADA by failing to afford Pollard a "reasonable accommodation." Nor could a reasonable juror conclude by a preponderance of the evidence that High's intentionally took adverse employment actions against Pollard on account of a "disability" under the ADA.

The fortuity that almost two years later, in July 2000, and in the course of litigation which no one could have anticipated at the time Pollard resigned from her employment, Pollard's treating physician realized the the inaccuracy of his earlier prognosis as to Pollard's likely recovery, does not alter the fact that as far as anyone knew or could predict back in the fall of 1998, Pollard was only temporarily impaired and on the way to full recovery. Pollard's lack of patience with the pace of her own recovery and with High's willingness to overlook her manifest inability to work the requisite hours to resume the (higher paying) Area Supervisor position is a regrettable historical fact. But that is exactly what it is — a historical fact — and Dr. Brager's affidavit, based on 20/20 hindsight, cannot be read as if the opinion he expressed in the summer of 2000 was anything like the one he had reached in the fall of 1998, when it would have greatly mattered to Pollard and to High's.

Pollard also argues that this "Court has wrongly concluded that Plaintiff is not substantially limited in major life activities." She argues this error is demonstrated by undisputed evidence that "plaintiff suffered intense pain while working as a [S]tore [C]lerk." It is true, of course, that Pollard never completed an eight hour shift as a Store Clerk

once she returned to work on September 23, 1998. And I accepted as true her contention on summary judgment that even with the modified job duties High's provided to her (no heavy lifting, no repetitive bending), she found the Store Clerk position so physically demanding that it caused her great pain. However, an employer is entitled to rely upon an employee's statements about her work capabilities and it is entitled to rely upon the medical documentation which an employee provides about her capabilities. Those statements and that medical documentation indicated quite clearly that she was only temporarily impaired and would soon be able to perform as she once had. Indeed, as of September 29, 1998, Pollard was insisting that she was presently able to perform her former position as Area Supervisor.

I granted summary judgment to High's on Pollard's state law claim for constructive abusive discharge because she failed to proffer evidence to create a "factual issue as to whether her working conditions were purposefully made so intolerable that she was forced to quit." I noted in passing (in a footnote) that Pollard had failed to cite any law to support her assertion that Maryland recognized a cause of action for *constructive* abusive discharge, but I accepted that Maryland law did support such a claim for the purposes of the motion. In her present motion, Pollard now cites *Beye v. Bureau of Nat'l Affairs*, 59 Md.App. 642, 653, 477 A.2d 1197, 1203, *cert. denied*, 301 Md. 639, 484 A.2d 274 (1984), for the proposition that Maryland recognizes such a cause of action. The Court of Special Appeals held in *Beye* that the Maryland standard for evaluating whether an employee was constructively discharged "is whether the employer has deliberately caused or allowed the employee's working

conditions to become so intolerable that a reasonable person in the employee's place would have felt compelled to resign." *Id.*; *accord Moniodis v. Cook*, 64 Md.App. 1, 11-12, 494 A.2d 212, 217, *cert. denied*, 304 Md.631, 500 A.2d 649 (1985). Pollard thus confirms that I applied the proper legal standard in evaluating this claim. Accordingly, there is no warrant for granting her motion to alter or amend the judgment as to this claim.

Pollard has argued that I have committed several other "legal errors." I have considered her arguments in these regards and find them to be without merit.

For the reasons explained above, I shall deny Pollard's motion to alter or amend judgment. A separate order follows.

Filed: February 6, 2001

s/ Andre M. Davis
Andre M. Davis
United States District Judge

APPENDIX B — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT DENYING PETITION FOR REHEARING DATED AND FILED MARCH 25, 2002

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 01-1342
CA-99-3455-AMD

MARY D. POLLARD

Plaintiff - Appellant

v.

HIGH'S OF BALTIMORE, INCORPORATED

Defendant - Appellee

On Petition for Rehearing and Rehearing En Banc

The appellant's petition for rehearing and rehearing en banc was submitted to this Court. As no member of this Court or the panel requested a poll on the petition for rehearing en banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied.

IT IS ORDERED that the petition for rehearing and rehearing en banc is denied.

For the Court,
/s/ Patricia S. Connor
Patricia S. Connor
CLERK